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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 31**

[FAC 2005-76; FAR Case 2013-017; Item III; Docket 2013-0017, Sequence 1]

**RIN 9000-AM64**

**Federal Acquisition Regulation; Allowability of Legal Costs for Whistleblower Proceedings**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 that addresses the allowability of legal costs incurred by a contractor or subcontractor related to a whistleblower proceeding commenced by the submission of a complaint of reprisal by the contractor or subcontractor employee.

**DATES:** Effective: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER.**]

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221 for clarification of

content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-76, FAR Case 2013-017.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

DoD, GSA, and NASA published an interim rule in the Federal Register at 78 FR 60173 on September 30, 2013, to implement sections 827(g) and 828(d) of the National Defense Authorization Act (NDAA) FY 2013 (Pub. L. 112-239). Section 827(g) amends 10 U.S.C. 2324(k), Allowable costs under defense contracts, and section 828(d) similarly amends 41 U.S.C. 4310, Proceeding costs not allowable, to address the allowability of legal costs incurred by a contractor or subcontractor in connection with a whistleblower proceeding commenced by a contractor or subcontractor employee submitting a complaint of reprisal under the applicable whistleblower section (10 U.S.C. 2409, Contractor employees: protection from reprisal for disclosure of certain information, or 41 U.S.C. 4712, Pilot program for enhancement of contractor [employee] protection from reprisal for disclosure of certain information, respectively).

### **II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

**A. Summary of significant changes**

In response to a public comment, the final rule has been modified to expressly include whistleblower complaints in the provisions at FAR 31.205-47(c).

**B. Analysis of public comments**

One respondent submitted comments on the interim rule.

**1. Allowability of costs prior to completion of litigation**

**Comment:** The respondent commented that the revised regulation can be read and understood to allow an agency to declare all costs associated with responding to a whistleblower complaint of reprisal as presumptively unallowable until the matter is completely litigated and the contractor prevails, at which point the contractor's recovery of the reasonable net costs are limited by the not-to-exceed-80 percent rule. According to the respondent, this effectively forces the contractor to finance the defense of such claims, even if the cost of settlement could be less than the cost of defense.

**Response:** This interim rule has directly implemented the statutory requirement. The costs incurred in connection with any proceeding brought by a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409 are treated exactly the same as the pre-existing cost principle treats costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730.

Any proceedings costs which are incurred in connection with any proceeding under FAR 31.205-47(b), and which are not made unallowable by that paragraph, are subject to the allowability rules of FAR 31.205-47(c), (d), and (e). The not-to-exceed-80 percent rule in the provisions of FAR 31.205-47(e)(3), which addresses the allowability of reasonable net costs incurred in connection with proceedings described in paragraph (b), applies equally to all proceedings addressed in paragraph (b), including those proceedings for whistleblower complaints of reprisal added by 41 U.S.C. 4712 or 10 U.S.C. 2409.

**Comment:** The respondent considered that the interim rule effectively prohibits settlement of whistleblower claims by making related legal costs entirely unallowable if the proceeding "could have led" to an agency order for corrective action, with no apparent exceptions.

The respondent noted the statement in the Initial Regulatory Flexibility Analysis that this rule "would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409, and if that proceeding resulted in imposition of a monetary penalty or an order to take corrective action." The respondent did not reach a similar conclusion, because the rule also affects a contractor who settles a whistleblower case that "could have led" to imposition of a monetary penalty or an order to take corrective action. The respondent requested that language be added at FAR 31.205-47(c), to provide the same treatment for whistleblower complaints as is currently provided for settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene.

**Response:** The Councils have incorporated the requested change in the final rule. The FAR includes paragraph (c) to provide interpretation of the cost principle when the matter is resolved through consent or compromise. Now that

whistleblower proceedings have been included in paragraph (b), it is reasonable that they should be covered in paragraph (c) as well.

The Final Regulatory Flexibility Analysis has also been reworded to address potential impact if the proceedings result in the consequences covered by paragraphs 31.105-47(b)(3) through (b)(5).

### **III. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **IV. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory

Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This action implements sections 827(g) and 828(d) of the National Defense Authorization Act for FY 2013. The objective of this rule is to address the allowability of legal costs incurred by a contractor in connection with a proceeding commenced by an employee submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712. The statutory authority is 10 U.S.C. 2324(k) and 41 U.S.C. 4310.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

Most contracts awarded on a fixed-price competitive basis do not require application of the cost principles. Most contracts valued at or below the simplified acquisition threshold are awarded on a fixed price competitive basis. Requiring submission of certified cost or pricing data for acquisitions that do not exceed the simplified acquisition threshold is prohibited (FAR 15.403-4(a)(2)). According to Federal Procurement Data System (FPDS) data for FY 2012, there were 73,014 Federal new contract awards over the simplified acquisition threshold in FY 2012. Of those contracts, only 11,279 awards were to small businesses on other than a competitive fixed-price basis. Within that number of awards, this rule would only affect a contractor if a contractor employee commenced a proceeding by submitting a complaint under 10 U.S.C. 2409 or 41 U.S.C. 4712, and if that proceeding resulted in any of the consequences listed at FAR 31.205-47(b). DoD, GSA, and NASA do not have data on the percentage of contracts that involve submission of a whistleblower complaint and result in monetary penalty or an order to take corrective action. There are no reporting, recordkeeping, or other compliance requirements in this rule.

DoD, GSA, and NASA were unable to identify any alternatives to the rule which would reduce the impact on small entities and still meet the requirements of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## **V. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

**List of Subjects in 48 CFR Part 31**

Government procurement.

Dated: July 18, 2014.

William Clark,  
Acting Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.



**INTERIM RULE ADOPTED AS FINAL WITH CHANGES**

Accordingly, the interim rule amending 48 CFR part 31, which was published in the Federal Register at 78 FR 60173, September 30, 2013, is adopted as final with the following changes:

**PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

1. The authority citation for 48 CFR part 31 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 31.205-47 by—

a. Redesignating paragraph (c)(2) as paragraph (c)(2)(i);

b. Removing from the newly redesignated paragraph (c)(2)(i) "proceeding," and "States," and adding "proceeding" and "States" in their places, respectively; and

c. Adding paragraph (c)(2)(ii) to read as follows:

**31.205-47 Costs related to legal and other proceedings.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(i) \* \* \*

(ii) In the event of disposition by consent or compromise of a proceeding brought by a whistleblower for alleged reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 2409, reasonable costs incurred by a contractor or subcontractor in connection with such a proceeding that are not otherwise unallowable by regulation or by agreement with the United States may be allowed if the contracting officer, in consultation with his or her legal advisor, determined that there was very little likelihood that the claimant would have been successful on the merits.

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[BILLING CODE 6820-EP]

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